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FEB 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 20, 1998

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

**RE: Filing of the Reply Comments of the Small Cable Business Association
in Response to the Memorandum of Opinion and Order and Notice of
Proposed Rulemaking. CS Docket No. 97-248 and RM NO. 9097**

Dear Ms. Salas:

We enclose for filing an original and twelve copies of the above reference reply comments. We ask that you file stamp one of the copies as received and return it in the enclosed Federal Express envelope.

If you have any questions or need additional information, please call us.

Very Truly yours,

BIENSTOCK & CLARK



Eric E. Breisach

cc: Meredith Jones
William Johnson
John Logan
Claire Blue

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

FEB 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992

Petition for Rulemaking of
Ameritech New Media, Inc.
Regarding Development of Competition
and Diversity in Video Programming
Distribution and Carriage

CS Docket No. 97-248

RM No. 9097

**REPLY COMMENTS
OF THE
SMALL CABLE BUSINESS ASSOCIATION**

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February 22, 1998

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SUMMARY

Effective program access rules can play a critical role in controlling the cost of programming to independently owned small cable systems -- systems that comprise about two-thirds of the nation's cable systems. Access to lower cost programming has a profound impact on cable rates. The Small Cable Business Association ("SCBA") has fought for its entire five-year existence for effective program access rules. Consequently, when the Commission offered this proceeding to examine certain program access related issues, SCBA offered innovative proposals in its comments.

The issues and rationale for proposals offered by SCBA were all either supported or corroborated by other commenters:

- ◆ **Exempt certain buying groups from joint and several liability requirements.** No commenters opposed this proposition. Two, both vertically-integrated programmers, supported SCBA's recommendation. The Commission must modify its rules to exempt certain qualified buying groups from any joint and several liability requirement to keep the history of programmer abuse from repeating itself.
- ◆ **Establish an alternative dispute resolution mechanism for price discrimination complaints.** The existence of only 38 program access complaints during the last five years underscores the inability of small cable businesses to afford prosecution of formal complaints. The fact that 60% of those complaints resulted in settlements confirms that the earlier programmers must reveal relevant information, the sooner business-to-business settlements will occur. SCBA strongly encourages the Commission to allow buying groups, on behalf of large numbers of small cable systems, to have standing to file program access

complaints and to require that programmers submit relevant information to the buying groups to facilitate business-to-business solutions to program access issues.

- ◆ **Establish prospective rate relief as a remedy for price discrimination violations.** The commenters share little common ground regarding the appropriate remedy for program access violations. The rules must provide small cable with meaningful and certain relief without adding undue complexity. Where price discrimination has occurred, SCBA strongly recommends that the Commission craft limits on future pricing of programming. SCBA has proposed that the Commission require offending programmers to provide programming at costs 20% below the rate the small cable operator was entitled for the two year period following resolution of the complaint.

SCBA's simple but important proposals will breathe life into the program access rules for small cable by significantly reducing administrative burdens on the Commission, facilitating business-to-business resolutions, and ultimately benefitting consumers in rural America who will have access to programming at more reasonable rates.

**Before the
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and Diversity in Video Programming)	
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**REPLY COMMENTS
OF THE
SMALL CABLE BUSINESS ASSOCIATION**

To: The Commission

I. INTRODUCTION

Access to programming at reasonable rates remains a critical concern to small cable and its customers. Small cable must have access to volume discounts comparable to those offered to its competitors and other large cable operators. The use of buying groups remains essential to small cable's ability to access those discounts. Today, however, even though small cable has established a buying group that would rank in size to the third largest multiple system operator, small cable still lacks access to the full extent of volume discount pricing that the law provides.

On behalf of its almost 300 members, the Small Cable Business Association ("SCBA"), representing nearly two million rural subscribers, has repeatedly expressed serious concerns regarding program pricing throughout the Association's five-year history. Because of its concerns,

SCBA filed extensive comments in this proceeding, suggesting several innovative solutions to bring life to the program access provisions for small cable. Many of the comments filed in this proceeding support SCBA's assertions. SCBA briefly reviews these points for the Commission.

II. THE RECORD UNIFORMLY SUPPORTS ELIMINATING JOINT AND SEVERAL LIABILITY OF BUYING GROUP MEMBERS.

A. The Commission must act to stem future abuses.

SCBA wants to keep history from repeating itself. Many vertically-integrated programmers have used the absence of joint and several liability by buying group members as an excuse to avoid their mandate to sell to buying groups. True, all vertically-integrated programmers currently sell to the small cable buying group, the National Cable Television Cooperative ("NCTC"), but no guarantee exists that these same programmers will renew their contracts or that newly created vertically-integrated programmers will sign contracts with NCTC. The Commission should take prudent and unopposed action to modify its regulations in order to keep history from repeating itself.

B. No Opposition Expressed Against Removal of Buying Group Joint and Several Liability.

Of the more than 20 commenters in this proceeding representing all types of programmers, cable associations and competitors to traditional cable systems, not one commenter in this proceeding opposed the removal of joint and several liability for buying group members. Two supported removal of this provision.¹

¹See, Comments of Comcast Corporation and Comments of Home Box Office.

1. Comments of Comcast Corporation.

Comcast, citing the role of buying groups to reduce the cost of programming and, ultimately, consumer rates, called for the unequivocal removal of joint and several liability:

Rising programming prices are a major contributor to increases in cable rates. Because buying groups provide the opportunity for distributors (of all technologies) to obtain programming at more reasonable rates and terms, the Commission should do what it can to eliminate onerous and unnecessary conditions on participation in buying groups. Requiring joint and several liability of buying group members is an unnecessary disincentive to participation in buying groups, and Comcast supports the elimination of this requirement.²

These comments should prove particularly compelling to the Commission as Comcast makes them not only as a cable operator that is not a member of NCTC, but as an owner of vertically-integrated programming services that must sell to NCTC.³

2. Comments of Home Box Office.

Another vertically-integrated programmer,⁴ Home Box Office, also supports removal of joint and several liability *requirements* so long as a programmer has "sufficient guarantees of creditworthiness"⁵ from the buying group. SCBA agrees with Home Box Office.

SCBA designed a proposal to remove a requirement that vertically-integrated programmers have used to avoid their obligations under the program access rules, without exposing programmers

²Comcast Comments at 16.

³Comcast owns interests in a number of programming services, including E! Entertainment TV (in a joint venture with Disney), QVC, Inc., and The Golf Channel.

⁴Home Box Office is 100% owned by Turner Broadcasting, a wholly owned subsidiary of Time Warner, the owner and operator of cable systems.

⁵Home Box Office Comments at 8.

to any increased default risk.⁶ The Commission cannot, however, leave to the programmer's sole discretion the type of financial assurances that a programmer can demand. SCBA has proposed objective factors that identify when the elimination of joint and several liability will not impair the financial position of programmers.⁷

The use of buying groups can have profound impact on small cable rates.⁸ No opposition to removal of joint and several liability exists. One commenter expressed support for retaining some standard of creditworthiness. The Commission should act on SCBA's proposal to ensure that programmers subject to the program access rules have a continuing obligation to sell to buying groups, in turn, helping to keep small cable rates as low as possible.

III. COMMENTS SUPPORT SCBA'S PROCEDURAL CONCERNS.

A. The Minuscule Number of Complaints Verifies the Inability of Small Cable To Pursue Formal Complaints.

A number of commenters have suggested that the very low number of formal program access complaints verifies the absence of wide-spread program access abuses.⁹ Before accepting this proposition, the Commission must recall the composition of cable systems in the United States. More than 7,000 of the nation's 11,000 cable systems constitute small systems under the

⁶SCBA Comments at 7-8.

⁷SCBA Comments at 7.

⁸*Id.* at 3.

⁹*See, e.g.,* Comments of Liberty Media Corporation at 3 (citing only 38 formal program access complaints in five years).

Commission's definition.¹⁰ About three-quarters of the nation's cable systems are small, independently owned systems. Many of the others are owned by vertically-integrated programmers.

The small number of formal complaints verifies SCBA's assertion that the vast majority of small cable systems — systems that often experience price discrimination, despite purchasing programming through a large buying group — have not filed formal program access complaints. These small systems lack the administrative and financial resources to pursue formal program access complaints against some of the largest media companies in the world. Small cable needs a different avenue for meaningful small cable relief. SCBA reiterates its call to give buying groups standing to pursue program access complaints on behalf of its members.¹¹

B. The High Settlement Rate Supports the Earliest Possible Provision of Information by Programmers.

Liberty Media shows the following resolution of formal program access complaints filed with the Commission over the past five years:¹²

Resolution	Percentage
Relief Granted by Commission	10
Denied/Dismissed/Withdrawn	30
Settled	60
Total	100

¹⁰*Sixth Report and Order and Eleventh Order on Reconsideration*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 and 93-215 (released June 5, 1995) at ¶ 33.

¹¹SCBA Comments at 11.

¹²Comments of Liberty Media at 4.

Liberty media cites this settlement rate in an effort to demonstrate that the "Commission has been highly successful in encouraging parties to privately resolve program access disputes."¹³ While this statement may be true, one must examine the factors compelling settlement. SCBA believes that the prospect of mandatory disclosure of sensitive programming information likely facilitated the settlements.

SCBA strongly encourages business-to-business settlements. The statistics cited by Liberty Media reveal that operators must still proceed to the formal complaint process to achieve these settlements. SCBA's proposal to allow a buying group representative, such as NCTC, to obtain such information on behalf of all of its members -- more than half the cable systems in the country -- would foster such business-to-business settlements without the need to even file the formal program access complaint.

IV. LIQUIDATED DAMAGES WILL PROVIDE THE ONLY MEANINGFUL RELIEF FOR SMALL CABLE.

A. Actual Damages for Individual Small Systems will Provide no Deterrent.

Commenters offered the Commission a variety of options to impose financial consequences to remedy and deter future complaints. Some commenters suggest that the imposition of actual damages on the cable system as the appropriate sanction.¹⁴ SCBA disagrees given the complexity of establishing those damages and the relatively small dollar amount involving individual small systems.

¹³*Id.*

¹⁴*See, e.g.,* Comments of Bell Atlantic at 8.

Bell Atlantic suggests that the Commission “calculate appropriate damages on a case-by-case basis.”¹⁵ Even Bell Atlantic, however, acknowledges that the computation of lost profits presents “more complicated computations.”¹⁶ The computation of actual damages would add yet another layer of complexity, dispute and uncertainty to the successful prosecution of a program access complaint -- cost and complexity that will only raise the bar for small cable systems seeking relief.

B. The Commission Must Provide Meaningful Relief.

SCBA renews its call for meaningful relief for small cable systems that have suffered the effects of program access violations. The relief provided cannot create any additional complexity and must deter future violations by providing certainty as to the result. The only relief that meets these criteria is a form of liquidated damages that provides meaningful and lasting relief to the affected cable system and will deter future conduct by establishing programming rate limitations for a fixed period of years.

SCBA has proposed that the Commission require offending programmers to sell their product to small cable at rates 20% below the rates required by the program access rules, with certain safeguards to ensure that programmers do not game the system. These prices, if maintained for a two-year period, will help to offset the harm inflicted on small cable. The two-year period also creates a safe harbor during which the small operator will not likely need to seek further formal relief. SCBA strongly urges the Commission to adopt SCBA’s proposed remedy structure where

¹⁵Comments of Bell Atlantic at 8.

¹⁶*Id.*

price discrimination has occurred.¹⁷ In addition to providing meaningful relief, it will also provide the certainty, encouraging business-to-business solutions.

V. STRICTLY ENFORCE LIMITS ON THE NUMBER OF PLEADINGS.

One commenter raises an important procedural problem that SCBA has encountered. In response to formal challenges before the Commission, large programmers often respond by filing pleading after pleading, waging a war of financial attrition that small cable and other smaller entities cannot effectively combat. The Commission's pleading rules set forth the permissible pleading cycle.¹⁸ The Joint Comments of American Programming Service, Inc., *et. al.*, cite examples where the Commission has accepted fourth and fifth pleadings.¹⁹ SCBA has experienced similar conduct and requests that the Commission act to limit, in all but the most extraordinary cases, the pleadings to those set forth in its regulations.

VI. CONCLUSION.

The comments in this proceeding fully support the recommendations that SCBA made in its initial comments:

- ◆ Joint and several liability of buying group members no longer serves a purpose and should be removed;

¹⁷See, SCBA Comments at 14 for details.

¹⁸See, 47 C.F.R. § 76.1003(b) (limiting the pleadings to a complaint, answer and reply, plus additional written submissions such as briefs and written interrogatories).

¹⁹Joint Comments of American Programming Service, Inc.; Consumer Satellite Systems, Inc.; Programmers Clearing House, Inc.; Satellite Receivers, Ltd; and Satellite Distributors Cooperative at 7.

- ◆ The current cost of pursuing program access complaints precludes the vast majority of small cable systems from even filing complaints, emphasizing the need to give buying groups standing for their members; and
- ◆ The Commission must establish liquidated damages that provide certain and meaningful relief.

For the reasons set forth in its initial comments, and as supported by other commenters, SCBA strongly urges the Commission to modify the program access rules to ensure their efficacy for the thousands of small and independently owned cable systems across America.

Respectfully submitted,
SMALL CABLE BUSINESS ASSOCIATION

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